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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

| | | |
|-------------------------------|---|------------------------------|
| Angel Malave, an individual, |) | Case No. CV-11-7371 R (JEMx) |
| Plaintiff, |) | |
| |) | <i>Hon. Manuel L. Real</i> |
| vs. |) | |
| |) | EX PARTE APPLICATION FOR |
| DEBT RESOLUTION |) | LEAVE TO FILE SECOND |
| CENTER, f/k/a |) | AMENDED COMPLAINT OR IN |
| FREEDOM DEBT CENTER, a |) | THE ALTERNATIVE, FOR AN |
| California Corporation; |) | ORDER SHORTENING TIME |
| NATIONWIDE SUPPORT |) | SO THE MOTION FOR LEAVE |
| SERVICES, INC., a California |) | TO FILE SECOND AMENDED |
| corporation and Does 1 to 10, |) | COMPLAINT CAN BE HEARD |
| |) | ON NOVEMBER 7, 2011 |
| Defendants | | |
| . | | Courtroom: 8 (second floor) |
| | | Date: TBD if necessary |
| | | Time: TBD if necessary |

Plaintiff Angel Malave seeks leave to file a second amended complaint (first amendment as to Defendant Nationwide Support services) or in the alternative, seeks an order shortening time so that a motion may

EX PARTE APPLICATION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT OR IN THE ALTERNATIVE, FOR AN ORDER SHORTENING TIME SO THE MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT CAN BE HEARD ON NOVEMBER 7, 2011

1 be heard consecutively with Defendants' motion to dismiss and motion for a
2 more definite statement, on November 7, 2011 at 10:00 a.m..

3 This motion is being made ex parte to request the court grant Plaintiff
4 relief from Local Rule 7-3, as there is not time to wait 10 days prior to filing
5 motion or 5 days prior to the last day for filing the motion following the
6 conference of counsel pursuant to L.R. 7-3. The parties did communicate
7 about the subject of this motion, both via email on October 20, 2011 and on
8 telephone on October 24, 2011.

9 Defendants oppose this ex parte application and did not wish to
10 stipulate for leave to amend.

11 Pursuant to Local Rule 7-15, Angel Malave waives oral argument and
12 requests that the Court dispense with oral argument on
13 this motion.

14 This motion will be made pursuant to Rule 15 of the Federal Rules of
15 Civil Procedure because the interests of justice require amendment. This
16 motion will be based upon this notice of motion, the attached memorandum
17 of points and authorities, supporting declarations, and exhibits, upon the
18 pleadings and papers on file in this action, and upon any additional
19 evidence that the Court may require.

20
21 I. INTRODUCTION:

22 Plaintiffs' motion for leave to file a second amended complaint seeks
23 to respond to the Defendants' joint motion for a more definite statement
24 and motion to dismiss (which addressed three of the four claims in
25 Plaintiff's first amended complaint.)

26 As the first amended complaint added Defendant Nationwide Support
27 Services, Inc. ("Nationwide"), this will be the first amendment as to
28

1 defendant Nationwide.

2 The first amended complaint was filed by agreement of Plaintiff and
3 DEBT RESOLUTION CENTER, f/k/a FREEDOM DEBT CENTER, a
4 California Corporation ("DRC") and with court order with an agreed
5 stipulation to file in the state court.

6 This will be the first amendment in Federal Court and the first
7 amendment as to Defendant Nationwide Support Services. Nationwide
8 Support Services has not filed a responsive pleading in this litigation in
9 either state or federal court.

10 Good cause exists in that the by the filing of a second amended
11 complaint will clarify the claims of Plaintiff. Both parties will save time and
12 speed negotiation by narrowing the claims at issue and omitting the
13 need of some of Defendant's written and oral discovery.

14
15 II. STATEMENT OF FACTS

16 Angel Malave filed a complaint in pro se in Los Angeles Superior
17 Court on August 27, 2010, against Defendant Debt Resolution Center
18 ("DRC") and former Defendant Noteworld LLC. Defendants, as well as
19 new Defendant Nationwide, work together to offer "Debt Relief Services" to
20 consumers.

21 Mr. Malave initially sued DRC and Noteworld for breach of contract,
22 violations of California's check sellers, bill payers and proraters law,
23 violations of California's Consumer Legal Remedies' Act, and breach of
24 fiduciary duty.

25 Angel Malave was targeted by Defendant Debt Resolution Center,
26 f.k.a. Freedom Debt Center, and received mailers promising he could pay
27 off his debt in a short time for one monthly low payment. At that time, Mr.

1 Malave was undergoing testing for possible cancer and his mind was on his
2 family and how they would fare if he were not only diagnosed as having
3 cancer, but things progressed for the worst. He saw the program at Debt
4 Resolution Center as a way to pay off the family's credit card debt faster
5 and so despite being current with all his credit cards, Mr. Malave joined the
6 debt settlement program. As he began the program, Mr. Malave was
7 diagnosed with cancer.

8 As instructed by DRC employee's, Mr. Malave ceased his payments
9 on his credit cards and instead made monthly payments to DRC. The idea
10 was that Mr. Malave would save money in a trust account held by
11 Noteworld (since dismissed from this suit) and DRC would make
12 settlements with the creditors and pay off the debt with money saved in the
13 trust account. However, the first payments all went towards DRC's fee,
14 and so when Mr. Malave was sued by his first creditor, little to no money
15 was saved for settlement.

16 Mr. Malave was given legal advice by the legal division at DRC, who
17 provided him with forms for requesting arbitration and after Mr. Malave
18 filled the forms out, he sent them to DRC and received corrections, then
19 Mr. Malave would file the documents.

20 Before dropping out of the program, in less than one year, Mr. Malave
21 was sued by four of his six creditors that had been enrolled in the program.
22 He filed motions to compel arbitration in all, as instructed by non-lawyers at
23 DRC, and three motions were granted and one denied.

24 None of his credit card debts were settled by DRC; instead, he
25 defaulted in all and was charged high penalties and late fees, all which
26 were added to the amounts he owed and compounded with interest rates
27 which had been increased due to his delinquent status. DRC likes to talk
28

1 about how they have returned Mr. Malave's payments, but they cannot
2 undue the damage they caused.

3 Mr. Malave's case is hardly unique, as studies have shown that the
4 majority of consumers (numbers vary but over 90%) who join Debt Relief
5 services end up spending money on fees and getting few or no debts
6 settled.

7 Because of DRC's advice, Mr. Malave was sued four times, his credit
8 was destroyed and the stress in his life increased geometrically as he was
9 undergoing treatments for his cancer.

10 11 III. PROCEDURAL HISTORY

12 Angel Malave filed a complaint in pro se in Los Angeles Superior
13 Court on August 27, 2010, against Defendant Debt Resolution Center and
14 former Defendant Noteworld LLC. Kleinpeter Dec. ¶4. Defendants, as
15 well as new Defendant Nationwide, work together to offer "Debt Relief
16 Services" to consumers. Mr. Malave dismissed Noteworld early in the
17 litigation, but Debt Resolution Center did answer the complaint.

18 Plaintiff's counsel, Amy Clark Kleinpeter, substituted into this matter
19 on or about February 14, 2011. Defendant's counsel, Steven Krongold,
20 substituted into this matter on or about July 27, 2011. The parties
21 stipulated to continue trial at that point. Kleinpeter Dec. ¶5.

22 Following further discovery, Ms. Kleinpeter determined that a
23 necessary party had been left out – Nationwide. Many of the actions
24 believed to have been taken by DRC were actually performed by
25 Nationwide, who also trained all DRC employees.

26 The parties stipulated to allow Plaintiff to file a first amended
27 complaint, which was filed in Los Angeles Superior Court on August 31,
28

1 2011. This complaint named Debt Resolution Center and the new
2 defendant, Nationwide Support Services. The claims were fraud, violation
3 of Consumer Legal Remedies Act, violation Of The Electronic Funds
4 Transfer Act, 15 U.S.C. § 1693 et seq., and negligent Infliction of Emotional
5 Distress (only one claim in common with initial complaint). Kleinpeter Dec.
6 ¶6.

7 This action was removed to Federal Court on September 9, 2011.
8 Defendants filed a Motion to dismiss and a Motion for More Definite
9 Statement on September 27, 2011.

10 Believing that Fed. Code of Civ. Procedure 15A applied, Plaintiff
11 attempted to file the second amended complaint in advance of the date the
12 opposition to Defendants' motions was due. The court clerk refused to
13 accept the filing, and the next day accepted the document with deficiencies
14 but not for filing. Misreading a local rule that states that "all" amended
15 documents must be electronically filed, Plaintiff's counsel also electronically
16 filed the second amended complaint. Kleinpeter Dec. ¶10.

17 The second amended complaint was rejected by this court on
18 October 20, 2011. Kleinpeter Dec. ¶11.

19 On October 20, 2011, Plaintiff contacted Defense counsel to see if
20 Defendants would stipulate to the filing of the second amended complaint
21 and provided Defendant with a copy as it was filed. Defendant did not
22 respond to the email or multiple calls to his office, but when Plaintiffs
23 counsel contacted him on his cell phone on October 24, she learned that
24 Defendants would not stipulate. Kleinpeter Dec. ¶13.

25 Plaintiff informed Defense counsel both in the October 24, 2011
26 phone call and in October 20 email, and then more formally in an email and
27 facsimile on October 25, 2011, that Plaintiff would be proceeding ex parte
28

1 for an order allowing leave to file second amended complaint or in the
2 alternative, an order shortening time on such a motion so that it would be
3 heard on November 7, 2011. A copy of this ex parte application and the
4 proposed second amended complaint was emailed to Defense counsel
5 prior to filing. Kleinpeter Dec. ¶2.

6
7 III. LEAVE TO AMEND SHOULD BE GRANTED

8
9 a. Plaintiff's second amended complaint should be allowed under the
10 court's policy of liberal provision of leave to amend

11 "[A] party may amend the party's pleading only by leave of court
12 or by written consent of the adverse party; and leave shall be freely given
13 when justice so requires." Fed. R. Civ. P. 15(a). "[L]eave to amend 'shall
14 be freely given when justice so requires,' Fed.R.Civ.P. 15(a), and this
15 policy is to be applied with extreme liberality." *Morongo Band of Mission*
16 *Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (two-year delay alone
17 insufficient to deny leave to amend).

18 "Ordinarily, courts will defer consideration of challenges to the merits
19 of a proposed amended pleading until after leave to amend is granted and
20 the amended pleading is filed." *Netbula, LLC v. Distinct Corp.*, 212 F.R.D.
21 534, 539 (N.C. Ca. 2003).

22 "Four factors are commonly used to determine the propriety of a
23 motion for leave to amend. These are: bad faith, undue delay, prejudice to
24 the opposing party, and futility of amendment." *Roth v. Garcia Marquez*,
25 942 F.2d 617, 628 (9th Cir. 1991). These factors do not carry equal weight.

26 The most important factor is whether the amendment will prejudice
27 the opposing party. *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir.

1 1973). Here, the claims are unchanged between the first and second
2 amended complaint and allegations in the second amended complaint are
3 very similar, they are just more detailed. The second amended complaint
4 describes the claims more clearly such as was requested in Defendants'
5 motion for a more definite statement and in response to Defendants' motion
6 to dismiss. Kleinpeter Decl., ¶ 7 Defendant will suffer no prejudice as a
7 result of the amendment.

8 The amended complaint is not submitted in bad faith. It is being filed
9 in response to Defendants' motions and more specifically describes the
10 fraud claim in particular but also addresses Defendants' concerns with the
11 CLRA and negligent infliction of emotional distress causes of action.
12 Kleinpeter Decl., ¶ 9.

13 There has been no undue delay. Plaintiff began work on the
14 amended complaint after receipt and review of Defendants' motion to
15 dismiss and motion for a more definite statement. When Plaintiff's
16 amended complaint was rejected by the court, her counsel contacted
17 Defendant's counsel on October 16 and 17, but was unable to reach him
18 and he did not return her messages. She then contacted Defense counsel
19 via email on October 20, 2011, to request that Defendant stipulate to
20 amend. The October 20, 2011 email providing Defendant with an outline
21 on the legal reasoning why amendment should be allowed, the proposed
22 stipulation and proposed amended complaint. Kleinpeter Decl., ¶ 3.

23 Local Rule 7-3 requires Plaintiff to wait 10 days before filing the
24 motion under Local Rule 7-3 or 5 days prior to last day motion must be
25 filed. Both would have put the motion date past the date of the unopposed
26 motion for a more definite statement and motion to strike, so Plaintiff is
27 proceeding ex parte for an order shortening time – clearly no delay.

1 Finally, the amendment would not be futile. Plaintiff has responded to
 2 the Defendants' concerns on his fraud claim and clearly delineated which
 3 phrases and alleged facts were communicated to him, who made each
 4 communication, when each was made and how he relied on each and how
 5 for each, Defendants had knowledge the communication was false. Plaintiff
 6 as also addressed Defendants concerns on the applicability of the CLRA
 7 claim and added detail to the negligent infliction of emotional distress claim.

8 Additionally, the fourth claim for EFTA violations as to Nationwide,
 9 was not mentioned in Defendants' motion to strike, so allowing Plaintiff to
 10 continue on this claim seems to not be futile.

11
 12 b. Plaintiff should be allowed to file the second amended complaint as a
 13 matter of course under Fed. R. Civ. P. 15(a)

14 Plaintiff's first amendment was with court permission after agreement
 15 by all parties, and therefore did not use the "free" amendment allowed
 16 under Fed. R. Civ. P. 15 (a) "(1) Amending as a Matter of Course. A party
 17 may amend its pleading once as a matter of course within: (B) if the
 18 pleading is one to which a responsive pleading is required, 21 days after
 19 service of a responsive pleading or 21 days after service of a motion under
 20 Rule 12(b), (e), or (f), whichever is earlier."

21 Federal courts have found that Plaintiff was allowed to make use of
 22 the right to amend as a matter of course for a second amended complaint if
 23 the first was filed pursuant to court order. *See, e.g. Thompson v. Jiffy Lube*
 24 *Intern., Inc.*, D.Kan.2007,505 F.Supp.2d 907, "Plaintiffs could file second
 25 amended complaint as of right, after seeking and receiving court
 26 permission to file first amended complaint."

1 c. In the alternative, the court should allow the filing of the second
2 amended complaint for Nationwide alone under Fed. R. Civ. P. 15 (a)

3 Also, Defendant Nationwide has never filed a responsive pleading in
4 this matter in state or federal court. Under Rule 15(a), courts should grant
5 leave to amend as a matter of course until a responsive pleading is filed.
6 *See, Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th
7 Cir.1992) and *Motley v. Parks* (C.D. Cal. 2000) 198 F.R.D. 532, 533.

8 Because Nationwide was not a defendant in the initial complaint, this
9 will be the first amendment relating to Nationwide. "If there is more than
10 one defendant, and not all have served responsive pleadings, the plaintiff
11 may amend the complaint as a matter of course with regard to those
12 defendants that have yet to answer." *Boyd v. District of Columbia*,
13 D.D.C.2006, 465 F.Supp.2d 1.Federal Civil Procedure).

14 At the very least, Plaintiff has a right to file, without court permission,
15 a complaint against Nationwide only.

16
17 **IV. CONCLUSION**

18 For all of the foregoing reasons, Angel Malave's ex parte application
19 for leave to file an amended complaint should be granted. In the
20 alternative, Mr. Malave's ex parte application for an order shortening time
21 on the motion for leave to file an amended complaint should be granted.

22
23 Dated: October 25, 2011 Clark Kleinpeter Law

24
25 By /s/ Amy Clark Kleinpeter
26 Amy E. Clark Kleinpeter
27 Attorney for Angel Malave, Plaintiff
28

DECLARATION OF AMY E. CLARK KLEINPETER

I, Amy E. Clark Kleinpeter hereby declare as follows:

1. I am counsel for Angel Malave in this action.
2. DECLARATION OF NOTIFICATION – Defendants OPPOSE this ex parte application. Plaintiff informed Defense counsel both in the October 24, 2011 phone call and in October 20 email, and then more formally in an email and facsimile on October 25, 2011, that Plaintiff would be proceeding ex parte for an order allowing leave to file second amended complaint or in the alternative, an order shortening time on such a motion so that it would be heard on November 7, 2011. A copy of this ex parte application and the proposed second amended complaint was emailed to Defense counsel prior to filing. (True and correct copy of notice attached as Exhibit B).
3. MEET AND CONFER -- On October 16, 2011, Plaintiff's counsel contacted Defense counsel by telephone, but he stated he was on the other line and would call her back. On October 17, 2011, Plaintiffs counsel left a message with Defense counsel's office. Defense counsel did not return the calls. On October 20, 2011, Plaintiff contacted Defense counsel via email to see if Defendants would stipulate to the filing of the second amended complaint and provided Defendant with a copy of the second amended as it had been filed, a copy of the proposed stipulation and legal argument for allowing amendment. Defendant did not respond to the email or multiple calls to his office, but when Plaintiffs counsel contacted him on his cell phone on October 24, she learned that Defendants would not stipulate. (True and correct copy of email attached as Exhibit A).
4. Plaintiff filed this action on August 27, 2010. The first amended complaint was filed on August 31, 2011.
5. Plaintiff's counsel, Amy Clark Kleinpeter, substituted into this matter on or about February 14, 2011. Defendant's counsel, Steven Krongold, substituted into this matter on or about July 27, 2011. The parties stipulated to continue trial at that point.

EX PARTE APPLICATION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT OR IN THE ALTERNATIVE, FOR AN ORDER SHORTENING TIME SO THE MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT CAN BE HEARD ON NOVEMBER 7, 2011

6. The parties stipulated to allow Plaintiff to file a first amended complaint, which was filed in Los Angeles Superior Court on August 31, 2011. This complaint named Debt Resolution Center and the new defendant, Nationwide Support Services. The claims were fraud, violation of Consumer Legal Remedies Act, violation Of The Electronic Funds Transfer Act, 15 U.S.C. § 1693 et seq., and negligent Infliction of Emotional Distress (only one claim in common with initial complaint).
7. The second amended complaint is being filed in response to Defendants' motion for a more definite statement and motion to dismiss, both filed on September 27, 2011 and more specifically describes the fraud claim in particular but also addresses Defendants' concerns with the CLRA and negligent infliction of emotional distress causes of action.
8. Plaintiff began work on the amended complaint after receipt and review of Defendants' motion to dismiss and motion for a more definite statement.
9. The second amended complaint adds no new parties or claims. It more specifically describes the fraud claim in particular but also addresses Defendants' concerns with the CLRA and negligent infliction of emotional distress causes of action.
10. Believing that Fed. Code of Civ. Procedure 15A applied, Plaintiff attempted to file the second amended complaint in advance of the date the opposition to Defendants' motions was due. The court clerk refused to accept the filing, and the next day accepted the document with deficiencies but not for filing. Misreading a local rule that states that "all" amended documents must be electronically filed, Plaintiff's counsel also electronically filed the second amended complaint.
11. The second amended complaint was rejected by this court on October 20, 2011.
12. Plaintiff now moves for leave to file an amended complaint.

1
2 13. The proposed amended complaint has been submitted
3 concurrently with this ex parte application and the accompanying
4 motion.

5 14. I believe that the claims alleged in the amended complaint are
6 warranted by the facts and the law.

7 I declare under penalty of perjury that the foregoing is true and
8 correct.

9 DATED: October 25, 2011

10 /s/ Amy E. Clark Kleinpeter
11 Amy E. Clark Kleinpeter